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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

Blizzard Entertainment, Inc., and Valve
Corporation,

Plaintiffs,

v.

Lilith Games (Shanghai) Co. Ltd., uCool, Inc.,
and uCool Ltd.,

Defendants.

CASE NO. 3:15-cv-04084-CRB-JSC

The Honorable Charles R. Breyer

**RESPONSE OF VALVE CORPORATION
TO SUPPLEMENTAL BRIEF OF
UCOOL, INC. RE MOTION FOR
PARTIAL SUMMARY JUDGMENT**

DATE: TBD
TIME: TBD
CTRM.: 6, 17th Floor

1 In its March 14, 2017, Order, the Court directed uCool, Inc. and Valve Corporation to
 2 address a single issue: “how, *if at all*,” the following restriction contained in the Warcraft III
 3 EULA affects uCool’s pending Motion for Partial Summary Judgment (the “Motion”):

4 [Users are not entitled to] use or allow third parties to use the Editor
 5 and the New Materials created thereby for commercial purposes
 6 including, but not limited to, distribution of New Materials on a
 7 stand-alone basis or packaged with other software or hardware
 8 through any and all distribution channels, including, but not limited
 9 to, retail sales and on-line electronic distribution without the express
 10 written consent of Blizzard. (For this brief, the “Commercial Use
 11 Restriction.”)

12 Valve agrees with uCool that the Commercial Use Restriction does not affect resolution of
 13 the pending Motion or Valve’s Opposition to the Motion. uCool’s Supplemental Brief (the
 14 “Brief”) goes far beyond the scope of the Court’s March 14 Order to dwell on irrelevancies and
 15 strawmen. Valve’s position is set forth in its Opposition to uCool’s Motion, and the Court need
 16 not address uCool’s lengthy and confusing digressions about hypothetical (and not relevant)
 17 interpretations of the EULA.

18 In its pending Motion, uCool seeks an order precluding *Valve* from asserting *any*
 19 infringement claim in this lawsuit – either for DotA or Dota 2 – claiming that, as a matter of *law*,
 20 Valve can “never” demonstrate any ownership of DotA. Motion at 2. In order to defeat uCool’s
 21 Motion, Valve need only present evidence sufficient for a jury to reasonably determine that Valve
 22 owns the copyrights to the relevant works at issue (including as a joint owner with Blizzard).
 23 Opposition at 10; *Direct Techs LLC v. Elec. Arts, Inc.*, 836 F.3d 1059, 1069 (9th Cir. 2016).
 24 Valve’s Opposition presented extensive evidence to support its ownership claims, including
 25 substantial proof that DotA was authored by Valve’s predecessors-in-interest over a 15-year
 26 period. uCool now *agrees* that a jury reasonably could determine that the Commercial Use
 27 Restriction did not deprive Valve’s assignors (and Guinsoo, Blizzard’s assignor) of ownership
 28 rights they may have acquired in DotA by virtue of their authorship. Brief at 1-2 (noting that
 individuals including Eul, Guinsoo, and Icefrog who “developed” DotA “own the elements of
 those games they created.”). Thus, it now is beyond dispute that a jury reasonably could
 determine that Valve’s assignors acquired rights in DotA at creation by operation of law by virtue

1 of their authorship, and then assigned those rights to Valve. *See Schrock v. Learning Curve Int'l,*
 2 *Inc.*, 586 F.3d 513, 522 (7th Cir. 2009) (The Copyright Act “provides that copyright in a
 3 derivative work, like copyright in any other work, arises by operation of law once the author’s
 4 original expression is fixed in a tangible medium.”). The only issue presented in uCool’s Motion
 5 is the *scope* or nature of Valve’s assignors’ authorship. This is a factual question that does not
 6 depend on the interpretation of the Commercial Use Restriction or there being any assignment of
 7 rights to Valve under the EULA.

8 Because Valve and uCool agree that the Commercial Use Restriction is not relevant to the
 9 pending Motion, the Court should decline uCool’s invitation to address and decide the numerous
 10 strawmen issues discussed in its Brief. Most notable of these is uCool’s extensive discussion of
 11 whether language in the EULA, including language *other than* the Commercial Use Restriction,
 12 should be interpreted to have assigned rights in DotA to either Blizzard or Valve (as third-party
 13 beneficiary or Blizzard’s licensee). This issue is not before the Court, and need not be decided to
 14 resolve uCool’s Motion. By its Motion, uCool did not seek an adjudication of Blizzard’s rights in
 15 DotA under the EULA. And in opposition to the Motion, Valve has not claimed ownership rights
 16 by virtue of the EULA (including as a third-party beneficiary):¹ Valve’s ownership claim is by
 17 *assignment* from the DotA authors. Thus, the only relevant issue before the Court is whether a
 18 jury could reasonably find that Valve’s assignors owned the copyrightable expression they created
 19 in DotA, which they then assigned to Valve.

20 The other issues raised by uCool also are irrelevant. For example, uCool claims that it did
 21 not violate the Commercial Use Restriction when it created and distributed its infringing game.
 22 But that is not Valve’s argument. uCool infringed Valve’s copyright in DotA and Dota 2 when it
 23 appropriated those games in “Heroes Charge” without authorization.² Likewise, uCool speculates

24 ¹ Notably, uCool also has not contested Blizzard’s ownership of rights in DotA by assignment
 25 from Guinsoo (and Neichus).

26 ² uCool offers the hypothetical that among the ways it infringed DotA and Dota 2 was by copying
 27 heroes such as “Abbadon.” In so doing, uCool now contradicts its Motion by admitting that
 28 “Abbadon” and other DotA units were “created with the World Editor” (Brief at 9). Since
 Terrorblaze did not use the World Editor and never implemented any content into the game, it is
 now clear that he cannot be an author of DotA or any of its constituent elements. Baker Depo.,
 138:2-141:16 (“So you weren’t able to implement anything into DotA; is that correct? Yes, that is
 correct.”).

1 about whether a violation of the Commercial Use Restriction could give rise to a claim by Blizzard
2 for copyright infringement or for breach of contract against the DotA authors or other third parties.
3 Brief at 9. However, the issue is only hypothetical, including because DotA has never been
4 distributed commercially (it always has been offered for free), and to the extent any material from
5 DotA is included in Dota 2, Blizzard has consented in writing to any such use.

6 For the reasons set forth in Valve's Opposition, uCool's Motion should be denied. The
7 Court should not, and need not, address the EULA or its Commercial Use Restriction in order to
8 deny uCool's Motion.

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10 DATED: April 4, 2017

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